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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Amendment of the Commission's Rules to
Establish Competitive Service
Safeguards for Local Exchange Carrier
Provision of Commercial Mobile Radio
Services

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WT Docket No. 96-162

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COMMENTS OF RADIOFONE, INC.

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SUMMARY

Radiofone, Inc. (Radiofone), by its attorneys, hereby files these comments in response to the Notice of Proposed Rulemaking, Order on Remand, and Waiver Order, FCC 96-319, released Aug. 13, 1996 [hereinafter NPRM], in the captioned proceeding. Radiofone opposes any relaxation or elimination of the structural separation requirements for BellSouth's cellular services. Radiofone competes against and obtains roaming services from BellSouth in its provision of cellular service, and obtains interconnection from BellSouth's local exchange companies. BellSouth has continually discriminated against and acted anticompetitively toward Radiofone.

Structural separation for BellSouth's cellular operations must be retained in order to discourage further discrimination and anticompetitive acts, and to make such actions more readily detectable if they still occur. Additionally, the Commission should adopt rules to deter anticompetitive abuses of BellSouth's ability to jointly market and resell CMRS and local exchange services. Finally, Radiofone requests the Commission to retain the CPNI disclosure restrictions.

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Interest of Radiofone

Radiofone, Inc. is a family-owned business which directly holds four cellular licenses in southeastern Louisiana, and indirectly controls Baton Rouge Cellular Telephone Company and Houma-Thibodaux Cellular Partnership, which also hold southeastern Louisiana cellular licenses.

Approximately 40 years ago, Radiofone entered the telecommunications industry as a small, family-owned business. Its business gradually grew from telephone answering services, to paging (including wide-area paging), and two-way mobile telephone services to cellular service. Radiofone was one of only a comparative handful of cellular licensees which were

awarded cellular licenses through the Commission's comparative hearing process, based on a finding that Radiofone's proposed system best served the public interest.

Radiofone presently competes head-on with BellSouth Mobility, Inc., the wireline cellular licensee in New Orleans and Baton Rouge, Louisiana. Radiofone's customers use BellSouth's cellular services when they roam into BellSouth cellular service areas. As the carrier providing local exchange services throughout most of Radiofone's cellular service areas, BellSouth also provides interconnection services to Radiofone. Radiofone submits that the elimination of structural separation requirements for BellSouth would have an unfair, adverse impact on Radiofone.

I. The Record Supports Continued Structural Separation in Order to Prevent Anticompetitive Conduct by BellSouth

Radiofone has experienced BellSouth's discriminatory and anticompetitive practices first-hand, and other industries have likewise suffered anticompetitive practices at the hands of BellSouth. For example, in one instance where BellSouth denied roaming capability to a Radiofone affiliate, the Commission was forced to require the roaming interconnection to be made by BellSouth. Baton Rouge MSA Limited Partnership, 8 FCC Rcd. 2889 (1993). Radiofone has suffered other instances of anticompetitive conduct by BellSouth's cellular operations, including predatory pricing of cellular service aimed directly at Radiofone and its affiliates, and numerous denials and disconnection of roaming capability. Indeed, Radiofone's affiliate in Baton Rouge, Louisiana was not able to achieve interconnection until informal intervention by the U.S. Department of Justice.

These practices are described in the formal Complaint proceeding, Radiofone, Inc. v. BellSouth Mobility, Inc., File No. E-88-109, filed Aug. 2, 1988. A summary of the facts in that Complaint proceeding is enclosed herein as Attachment 1. Although the Complaint was filed in 1988, it was supplemented twice -- on January 15, 1991 and on June 16, 1995 -- to bring to the Commission's attention BellSouth's continuing pattern of anticompetitive abuse.

Most incredibly, as admitted by BellSouth, its wholesale cellular arm failed to charge its retail cellular affiliates for roaming, while it charged Radiofone \$2 per unit per day for roaming. In the Complaint proceeding, BellSouth agreed to an audit of its internal billing. Three months in 1988 and 1989 were used as proxies. BellSouth's billing records showed that BellSouth's wholesale cellular affiliate did not charge its retail affiliate the \$2 roaming fee during one of those three months. BellSouth Brief, at 30-31 (admitting to failure to bill \$2 fee in February 1988). Thus, BellSouth's discrimination in its provision of cellular service has been demonstrated and admitted by BellSouth.

BellSouth also admitted that records concerning the billing between its wholesale and retail affiliates were not created or transmitted on a regular basis. Id. at 31. Thus, BellSouth lacked the most basic management information that could have been used to ensure that its internal billing procedures were nondiscriminatory.

Although briefs on damages have not been filed in that Complaint proceeding, Radiofone has estimated its damages at approximately \$18 million. Radiofone Br. at 45. As previously noted, the Complaint details serial disruptions in Radiofone's customers' roaming capability, intentional foot-dragging in the restoration of roaming service and other anticompetitive conduct designed to injure Radiofone as a cellular competitor.

In sum, under the Commission's structural separation requirements, BellSouth has been discriminating and acting anticompetitively in its provision of cellular service. Without structural separation, BellSouth's ability to engage in anticompetitive mischief would be exacerbated. Thus, there is hardly a public interest basis for relaxing or eliminating structural separation.

Experience in other industries which compete against BellSouth confirms this point. For instance, both a U.S. Court of Appeals and the Georgia Public Service Commission have noted blatant discrimination by BellSouth against competitors in the voice mail industry. California v. FCC, 39 F.3d 919, 929 (9th Cir. 1994) (citing In the matter of the Commission's investigation into Southern Bell Telephone and Telegraph Company's Trial Provision of

MemoryCall Service, Docket No. 4000-U (Ga. PSC June 4, 1991)); see also United States v. Western Elec. Co., 767 F. Supp. 308, 320 n.57 (D.D.C. 1991) (stating that BellSouth delayed making a network feature available to its customers until BellSouth was ready to enter the voice messaging market); id. (stating that BellSouth "provided a call forwarding feature to its competitors under a tariff which raised these competitors' costs by as much as 900%"). Additionally, smaller long distance carriers have been forced to apply to the Department of Justice to remedy the discriminatory access pricing practices of BellSouth. Application of CompTel to the Department of Justice for Enforcement of the Modification of Final Judgment Against BellSouth Telecommunications, Inc., September 29, 1994.

Thus, there is ample basis to conclude that BellSouth would act in an anticompetitive manner, if allowed to integrate its retail cellular and local exchange carrier (LEC) operations, since it has already done so on unintegrated basis.

II. Analysis of Continued Need for Structural Separation

As stated by the Commission: "The structural separation requirement was intended to protect against improper cross-subsidization, to assure equitable interconnection arrangements, and to make the detection of anti-competitive conduct 'somewhat easier for the regulatory authorities.'" NPRM, para. 12. BellSouth's discriminatory and anticompetitive acts discussed above demonstrate the continued need for the structural separation requirement so that the Commission may deter and detect BellSouth's unlawful conduct.

Additionally, nothing in the regulatory environment in which BellSouth operates would support the relaxation of the structural separation requirements. To the contrary, the current regulatory environment supports the retention of the structural separation requirements. For example, when the Commission first imposed the structural separation requirements on the soon-to-be divested Bell Operating Companies (BOCs), it focused specifically on the BOCs' control over bottleneck facilities in "large, contiguous geographic areas." Report and Order, 95 FCC

2d 1117, 1139 (1983). As noted by the Commission, the BOCs still control bottleneck facilities. NPRM, para. 42. Significant local exchange competition has not developed.

Furthermore, recent changes in rate regulatory authority mandate the retention of the structural separation requirements. Last year, the Commission denied the Louisiana Public Service Commission's (PSC's) request to retain rate regulatory authority. Report and Order (Petition on Behalf of the Louisiana Public Service Commission for Authority to Retain Existing Jurisdiction over Commercial Mobile Radio Services Offered Within the State of Louisiana), 10 FCC Rcd. 7898, 7909 (1995). Thus, the regulatory authority of the Louisiana PSC no longer provides as much of a deterrent to BellSouth's anticompetitive conduct, and Radiofone cannot readily turn to the Louisiana PSC to remedy that conduct after it occurs. Although the FCC retains regulatory authority over BellSouth's cellular services, BellSouth has continued to act anticompetitively during the pendency of Radiofone's Complaint proceeding. The FCC's regulatory authority and its structural separation requirements therefore have not been a sufficient deterrent to BellSouth's anticompetitive practices. If anything, the FCC should act to strengthen its rules to ensure that BellSouth cannot engage in such anticompetitive practices in the future.

Another recent regulatory change is the Commission's elimination of the cellular/PCS cross-ownership rule. Although Radiofone supports that Commission decision, it opens the door to increased potential for anticompetitive conduct as BellSouth has the opportunity to obtain 20 MHz of broadband PCS spectrum, while it continues to provide cellular and bottleneck local exchange services in the same service areas. Structural separation should be retained to prevent anticompetitive conduct in BellSouth's role as a local exchange carrier.

The Commission agrees. In BellSouth v. FCC, No. 94-4113 (6th Cir.), BellSouth requested the court to eliminate the structural separation requirement so that BellSouth could provide one-stop shopping. The Commission stated:

[I]t will be quite a while before [PCS providers] pose any genuine competitive threat to an entrenched monopolist phone company such as BellSouth. For example, at this point no other company . . . can offer local telephone service

in BellSouth's monopoly area and thus nobody can offer the "one-stop shopping" that BellSouth would like to offer. To that degree, removing structural separation entirely . . . may well give BOCs a significant competitive advantage

Opposition of the FCC to BellSouth's Motion to Recall Mandate, at 10-11, BellSouth v. FCC, No. 94-4113, 95-3315 (6th Cir. July 29, 1996). And BellSouth has acknowledged its plans:

[The] 10 MHz PCS licenses are the licenses that were viewed as ideal for integration with wireline local exchange company operations. As BellSouth . . . own[s] wireline local exchange companies, these licenses are extremely important in their attempt to compete with PCS licensees. Further, these 10 MHz PCS licenses can be used by BellSouth . . . to compete against cellular providers who already have a substantial head start.

Joint Opposition to Emergency Motion for Stay, at 16-17, National Telecom PCS, Inc. v. FCC, No. 96-3383 (3d Cir. July 19, 1996) (footnotes omitted). BellSouth therefore plans to use its wireline service and PCS to compete with other PCS licensees and cellular carriers in its wireline service areas. But BellSouth also has cellular operations in those same areas. If anyone has a headstart, it surely is BellSouth which was the first to provide monopoly wireline service and the first to provide cellular service in those areas. More importantly, BellSouth stands alone in its ability to provide one-stop shopping for local exchange service, PCS and cellular service in its LEC service areas.

In sum, because: (a) BellSouth retains control of bottleneck facilities; (b) the Louisiana PSC no longer has rate regulatory authority; and (c) BellSouth may now provide one-stop shopping for 20 MHz of broadband PCS, local exchange service and cellular service, the Commission should retaining the structural separation requirements in order to restrain BellSouth in its exercise of its inherent competitive advantage.

III. Accounting Safeguards and Separate Affiliates Are Not Sufficient

The Commission states: "Our Joint Cost Order, affiliate transaction and Part 64 cost allocation rules, together with our price cap regime for tariffed LEC interstate services go far in reducing the possibility of undetected cost-shifting among the LEC interstate services."

NPRM, para. 46. But those safeguards are not enough. BellSouth was subject to those rules when it engaged in the discriminatory and anticompetitive acts discussed above.

Without structural separation, BellSouth would be able to inflict even more damage on its cellular competitors. Cross-subsidy can be effectuated in subtle ways such as misassignment of personnel time, CPNI abuses, misallocation of marketing costs, the delay in providing new network features to wireless carriers until BellSouth's wireless affiliates request them, and any number of other anticompetitive practices that are available where BellSouth provides local exchange service. The Commission's self-policing cost allocation rules are of small comfort to Radiofone. In addition to the voice mail abuses previously cited in these comments (which occurred under the existing cost allocation rules), Judge Greene noted that "[e]xperience has amply shown that regulatory enforcement proceedings often take years to complete and that, even then, the decisions that emerge are by and large only prospective in application." United States v. Western Elec. Co., 767 F. Supp. at 320. Additionally, an independent government agency has found that the Commission lacks the resources to perform more than one full audit of one major local exchange carrier once every 16 years. See General Accounting Office, Telephone Communications: Controlling Cross-Subsidy Between Regulated and Competitive Services, GAO/RCED-88-34, at 3, 52-53 (Oct. 1987).

In sum, cost allocation and affiliate transaction rules are hardly sufficient to deter the anticompetitive behavior which would result from the relaxation or elimination of the structural separation requirements. Radiofone agrees with the Commission's concern that "the possibility of discrimination by a BOC . . . in favor of its own cellular operations and against other CMRS providers could be increased absent some form of separate subsidiary requirement . . . and that [the FCC's] tasks of detecting such discrimination and determining whether it is reasonable or unreasonable would be greatly complicated." NPRM, para. 44. But separate affiliates combined with cost allocation and affiliate transaction rules are not enough. More stringent regulatory safeguards in the form of structural separation have not deterred BellSouth's

anticompetitive conduct. Without an option for even stronger safeguards, Radiofone requests, at a minimum, that the Commission retain the structural separation requirements.

IV. Joint Marketing and Resale Should Be Permitted Only Pursuant to Adequate Safeguards

Radiofone nevertheless recognizes that the structural separation requirements in Section 22.903 of the Commission's Rules may need to be reconciled with the provisions of the Telecommunications Act of 1996. However, the provision of Section 601(d) of the Telecommunications Act which permits BOCs to market jointly and sell CMRS in conjunction with landline services does not need to be reconciled with the Commission's structural separation requirements in Section 22.903 of the Commission's Rules. The two sections are consistent. Section 601(d) expressly states: "Notwithstanding section 22.903 . . . " and the proceeds to discuss marketing and sales but says nothing about separate affiliates. Radiofone therefore agrees with the Commission; Section 601(d) of the Telecommunications Act does not require the elimination of the remainder of Section 22.903 of the Commission's Rules. NPRM, para. 63.

A. Joint Marketing

Radiofone supports the safeguards against joint marketing abuses that were proposed by the Commission. Radiofone agrees that "the public interest in preventing, and permitting easy detection of, cross-subsidization requires that such joint marketing be done on behalf of the separate affiliate, subject to our affiliate transaction rules and classified as a non-regulated activity, on a compensatory, arms-length basis." NPRM, para. 64. To further facilitate detection of discriminatory and anticompetitive conduct, Radiofone agrees that the Commission should impose a requirement that all joint marketing and sales transactions among BellSouth's LEC operations and its CMRS operations, be reduced to writing and made available for public inspection. See NPRM, para. 64. As discussed above, the Commission has recognized that

BellSouth's ability to provide one-stop shopping gives it a competitive advantage. The safeguards proposed by the Commission will help ensure that BellSouth uses that advantage lawfully.

B. Resale

To prevent discriminatory resale practices, Radiofone agrees with the Commission's proposal to prohibit "one-of-a-kind" volume discounts for cellular service sold by the cellular affiliate of the LEC for resale to the end user. NPRM, para. 67. Radiofone also supports the Commission's proposal to require public disclosure of rates, terms and conditions of service in cases where the LEC is reselling its affiliate's cellular service. Id. As discussed above, BellSouth has demonstrated that the prohibitions against unjust or unreasonable discrimination in Section 202(a) of the Communications Act and the formal complaint process are not a sufficient deterrent to discriminatory prices. BellSouth also has taken the position that Section 202(a) does not apply to the cellular services at issue in Radiofone's Complaint proceeding. BellSouth Bf. at 28. For these reasons, limits on the type of discounts available to BellSouth's affiliates and disclosure requirements are needed in order to deter and be able to readily detect BellSouth's anticompetitive practices.

Radiofone opposes the Commission's proposal to permit BellSouth to jointly bill its local exchange and cellular services. NPRM, para. 68. Joint billing would give BellSouth an unnecessary competitive advantage. Another BOC, SBC, attempts to persuade its cellular customers to use SBC's interexchange cellular services with the incentive being that the interexchange cellular charges would appear on the same bill as the local cellular charges. BellSouth similarly could recommend that its LEC customers subscribe to BellSouth's cellular service in order to obtain a single bill for their wireline and wireless services. BellSouth is in the unique position of being able to offer such single billing. The Commission should not allow it.

The Commission's decision in Detariffing of Billing and Collection Services, 102 FCC 2d 1150 (1986), is inapposite. See NPRM, para. 68. That decision concerned the accounting treatment of a LEC's provision of billing and collection of wireline services. See 102 FCC 2d at 1175-76. It did not consider a LEC using joint billing as a marketing tool for the joint provision of wireline and wireless services. The competitive issues raised by one-stop shopping for wireline and wireless services require the Commission to expand the core structural separation requirements so as to proscribe joint billing. NPRM, para. 68.

V. The CPNI Rule Should Be Kept as Is

Another provision of Section 22.903 of the Commission's Rules concerns the disclosure of customer proprietary information (CPNI). That provision should be retained. See NPRM, para. 72. Section 22.903(f) states that a BOC may not provide CPNI to any separate affiliate unless the information is publicly available on the same terms and conditions. Radiofone submits that the rule should be retained due to BellSouth's continued dominance of the local exchange market.

BellSouth is in the unique position of obtaining usage information concerning every resident and business with its LEC service areas. If the Commission were to eliminate Section 22.903(f), BellSouth could use its monopoly position, including name recognition, to obtain its customers' permission to use their CPNI for the provision of cellular services. Indeed, another BOC, Bell Atlantic, has been packaging promotional materials, including coupons for area restaurants, with its requests for permission to use residential customers' CPNI. See Communications Daily, Aug. 14, 1996, at 5 (copy enclosed as Attachment 2). Such strategies place other telecommunications providers at a distinct competitive disadvantage.

The Commission should require that any oral or written requests made by BellSouth to use, disclose or permit access to CPNI must be requests only to make the CPNI publicly available, and must not give the customer the option of making it available only to BellSouth's affiliates. Although customers could still proactively request to have their CPNI disclosed only

to BellSouth's affiliates, BellSouth-initiated interactions concerning CPNI should not be so narrow in scope.

VI. Section 22.903 Should Not Sunset

As stated above, the Commission should not relax or eliminate the core structural separation requirements of Section 22.903. The Commission's proposal to sunset Section 22.903 at the time that a BOC enters into interLATA services (presumably due to the existence of a local exchange competitor) is analogous to declaring that AT&T was non-dominant on the day that MCI began providing interexchange service. The FCC did not declare AT&T to be non-dominant until a decade after AT&T faced competition from other interexchange carriers. In the case at hand, even after a local exchange competitor enters BellSouth's service area, BellSouth likely will continue to be dominant in its provision of local exchange service for a long time thereafter. It is that dominance that mandates the continuance of structural separation. Additionally, as noted by the Commission, BOC entry into interLATA services could occur even in the absence of a local exchange competitor. NPRM, para. 81.

Thus, it is premature to consider the sunset of the core structural separation requirements. At a minimum, the Commission should wait ten years before revisiting the issue. By that time, the PCS providers would have built out their systems to serve two-thirds of the population in their service areas as required under Section 24.203 of the Commission's Rules, and any local exchange competitors would have had an opportunity to establish a subscriber base. (This ten-year period also approximates the amount of time it took new interexchange carriers to establish their presence in the market before AT&T was declared to be non-dominant by the FCC.) After this ten-year period, the Commission could consider whether sufficient competition exists so that BellSouth would no longer possess market power.

VII. Joint Marketing and Billing Restrictions Should Apply to Other CMRS Services

The suggestions Radiofone has proposed above for the joint marketing, resale and joint billing restrictions of BellSouth's local exchange and cellular services also should apply to BellSouth's provision of PCS and other CMRS services in BellSouth's LEC service areas. In other words, if PCS were provided by one affiliate and marketed by another, the Commission's affiliation transaction rules should apply, and related agreements between the affiliates should be reduced to writing and made available for public inspection. The Commission should prohibit "one-of-a-kind" discounts if one affiliate were to resell the other affiliate's CMRS services, and the Commission should prohibit joint billing among BellSouth affiliates. The Commission also should require public disclosure of rates, terms and conditions of service in cases where one affiliate resells the other affiliate's CMRS services.


These restrictions should apply to PCS regardless of whether BellSouth holds 10 MHz or more than 10 MHz of PCS spectrum. BellSouth's ability to behave anticompetitively is not dependent on the amount of spectrum it possesses.

Until BellSouth no longer occupies the dominant position it now enjoys in its LEC service areas, safeguards must be in place to protect competition.

Conclusion

For the foregoing reasons, the Commission should retain the structural separation requirements for BellSouth's provision of cellular service. BellSouth has a demonstrated history of abusing its dominant position in local exchange and cellular services, and the historical background which led to the cellular structural separation requirement has not changed, but has been exacerbated by recent regulatory developments. The relaxation or elimination of the structural separation requirements would be not in the public interest and should not be adopted. Additionally, the Commission should adopt rules to deter anticompetitive abuses of BellSouth's ability to jointly market and resell CMRS and LEC services. Finally, Radiofone requests the Commission to retain the CPNI disclosure restrictions.

Respectfully submitted,
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ATTACHMENT 1

**Excerpt from Initial Brief of Radiofone, Inc., at 3-15
(Statement of Facts and Issues), Radiofone, Inc. v.
BellSouth Mobility, Inc., File No. E-88-109, filed Aug. 2,
1988.**

I. STATEMENT OF THE CASE AND FACTS

A. The August 2, 1988 Complaint

As previously discussed, the August 2, 1988 Complaint detailed several unlawful BMI practices adversely affecting Radiofone and its customers. The first such practice concerned BMI's discriminatory application of a \$2.00 per day roamer set-up fee to Radiofone (and ultimately its customers roaming on BMI-affiliated systems). The Complaint specifically detailed the roamer agreement Radiofone was required to sign in order to obtain automatic roaming in BMI cellular markets, e.g., Complaint, at 4-5, Attachment A, and the fact that despite the "pass-through" requirements of the agreement, requiring carriers to flow through the set-up charge to their customers, BMI was in fact waiving the charge at retail, id. at 5. As a result, Radiofone was forced to absorb those same costs, with the resulting financial damage to Radiofone, in order to remain competitive with BMI and its affiliates. Id. at 4.

Radiofone complained that this practice was unlawful for several reasons. First, the failure to pass-through the fee reflected the fact that, upon information and belief, the \$2.00 per diem charge was "at most . . . an accounting entry only" between BMI affiliates. Id. at 10. As such, the assessment of the fee in real dollars to Radiofone unreasonably discriminated against Radiofone, contrary to Section 202(a) of the Act, by favoring BMI's affiliated enterprises. Id. at 10-12. Alternatively, to the extent that BMI affiliates were really

assessed the charge, its failure to assess this fee at retail resulted in BMI's selling its roamer service substantially below its incurred costs. Id. The Complaint noted the anticompetitive and predatory nature of this type of pricing, and further noted that BMI had engaged in an advertising campaign to tout the results of those unlawful tactics. The Complaint pointed out that such anticompetitive activity was also proscribed by Section 314 of the Act and Commission precedent. Id. at 12-14, 17.

BMI answered these charges by initially claiming that it assessed the \$2.00 per diem fee from the "wholesaler" level (i.e., the BMI cellular licensee) to the retail level (i.e., BMI acting as the retail arm). Answer, at 6. BMI even claimed that its wholesale subsidiaries charged other BMI wholesale affiliates the \$2.00 fee when customers of those entities were roaming in BMI affiliated markets. Id. at 12. BMI also attached the sworn affidavit of Roy Etheridge, General Manager, New Markets for BellSouth Mobility, Inc. Mr. Etheridge's affidavit, among other things, reaffirms a conversation with Harrell Freeman, the Vice President of Radiofone, to the effect that the "wholesale daily rate" of \$2.00 was applied to all resellers equally, including BMI's own retail operations. Id. Attachment 13, para. 5. BMI admitted that it did not recover the \$2.00 charge at retail; however, it claimed that this cost was recovered "through its overall rates to cellular subscribers" rather than through a particular charge. Id. at 6.

These blandishments proved to be false. The Enforcement Division, perhaps intrigued by BMI's inconsistent statements that it was recovering the charge through its overall revenues, but that it should not be required to price its retail offerings at a level at least equal to its wholesale prices,¹ scheduled discovery by letter dated February 9, 1989.

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¹ These inconsistent statements appear in BMI's Answer, at 6, and its Motion to Dismiss, at 10. Indeed, these inconsistent statements, together with the fact that no written agreements existed between the BMI corporate layers, led Radiofone to later question whether the charge was assessed against the BMI affiliates in the first instance. Reply, at 5-6.

As set out in the Complaint, the discriminatory application of the \$2.00 roamer fee to Radiofone was not BMI's only anticompetitive activity. BMI also denied roamer access to Radiofone's subscribers, billed Radiofone incorrect (and higher) roamer airtime fees, and refused to issue credits. Additionally, BMI refused to reconnect roamer service in what is most accurately described as strong-arm tactics. In this latter circumstance, service was only restored after Radiofone sought the informal assistance of the Enforcement Division. These episodes are discussed below.

The first disconnection of roamer service discussed in the Complaint concerns Radiofone customers using the 450-8XXX number block. Radiofone customers served on this number block were customers obtained via resale by Radiofone during BMI's "headstart" period in New Orleans. See Complaint, at 6 n.8. The number block by which those customers were served was assigned to BMI. Id. This is because BMI and its affiliates refused to assign Radiofone its own block of numbers when Radiofone was forced to act as a reseller during BMI's "headstart" period. See Reply, at 8 n.3, Attachment A. BMI acted unreasonably in this respect, as Mr. Freeman, of his own personal knowledge, stated that other cellular carriers had not followed this practice. Reply, Attachment A, at 3. Mr. Freeman had discussed with Mr. Bill Brown (of BMI) Radiofone's intention to transition off this number block through a process of

customer attrition. Radiofone had no warning prior to the disconnection of its customers' roamer service. Id.

While not denying that the disconnection took place, BMI variously describes the disconnection as "technical occurrences," Answer, at 7 n.4, and caused by BMI's adoption of a positive validation system by the cellular industry, id. Attachment 14 (Affidavit of BMI employee Melba Martin). Predictably, it also blames Radiofone for "procrastinating" in "returning BMI's numbers." See id. Attachment 14, para. 4.²

Viewed in a light most favorable to BMI, the disconnection of roaming capability might be chalked up to negligence; for instance, Ms. Martin's Affidavit recounts her failure to realize the effect of positive roamer validation on Radiofone's "450-8XXX" customers.³ BMI's actions following the disconnection, however, were nothing but an intentional attempt to interfere with Radiofone's business.

² As the record demonstrates, BMI frequently attempted to blame others during the course of this controversy.

³ BMI's suggestion that Radiofone was at fault, although a familiar refrain, is wanting. As Radiofone's Reply pointed out (at 8 n.3), BMI has no ownership interest in the number block in the first instance. This Commission has previously ruled that carriers do not "own" NXX codes and numbers under the North American Numbering Plan. Memorandum Opinion and Order, 59 RR 2d 1275, 1284 (1984). Radiofone's desire to transition its customers off this particular number block was only an accommodation to BMI. Radiofone was under no legal compulsion to act in this manner and, BMI's assertions to the contrary notwithstanding, nothing about those circumstances justified the discontinuation of roamer service, without warning, to Radiofone's customers.

Specifically, as Mr. Freeman's affidavit makes clear, Radiofone encountered a series of BMI stalling tactics when it attempted to have roaming service restored. First, BMI's roamer coordinator informed Radiofone that, although BMI was aware that Radiofone's roamer customers had been denied access, that individual was not authorized to reactivate the service. The following day, Mr. Freeman faxed a letter to the President of BMI, Mr. Robert Tonsfeldt, and received a call back from Mr. Roy Etheridge. Again, Mr. Etheridge would not commit to reactivate Radiofone's customers' units. The next day, June 10, 1988, Mr. Etheridge again refused to reactivate Radiofone's units. See Freeman Affidavit, passim.

Radiofone's counsel then contacted Howard Wilchins, the Commission's Deputy Chief, Enforcement Division, to achieve a speedy restoration of service to Radiofone's customers. A meeting was held on June 14, 1988, wherein BMI's representative promised that Radiofone's service would be restored the next day. Radiofone was then informed that service would only be restored after it signed an agreement: (1) guaranteeing payment for roamer service (it is relevant that Radiofone had a perfect payment record with BMI, and BMI did not claim otherwise); and (2) agreeing to convert Radiofone's "450-8XXX" customers to the number block which had eventually been assigned for Radiofone's benefit by BMI and its affiliates.

BMI also warned Radiofone that it would disconnect its roamers' service again, by June 21, 1988, if it didn't sign the .

agreement. Radiofone did not sign the proposed agreement. Instead, Mr. Wilchins directed BMI to restore Radiofone's roamer service immediately. He also directed BMI not to terminate service on June 21, 1988. After further delay on BMI's part, the roamer service was finally restored. See Complaint, at 5-7, Attachment E. All of this occurred while Radiofone was in the teeth of a BMI local advertising and marketing campaign touting the automatic roaming capabilities of BMI, versus an alleged, lesser standard of service by competitors like Radiofone. See Reply, Attachments A, B.

In addition to the disconnection of roamer service for Radiofone's 450-8XXX customers, the Complaint also sought redress for the disconnection of Radiofone's customers roaming in BMI's Lafayette, Louisiana territory, and for BMI's refusal to correct erroneous airtime billings. See Complaint, at 8. As with the 450-8XXX number block, roaming capability for the Lafayette customers of Radiofone was not restored until after Radiofone sought informal assistance from the Commission's Enforcement Division in July of 1988; it had been complaining to BMI about the problem since February 29, 1988. See id. at 8, Attachments F, G.

BMI's Answer principally defended the disconnection as an inadvertent mistake, and sought to blame Radiofone for that mistake.⁴ Specifically, BMI relied upon an affidavit of Reid

⁴ BMI also claimed that "Radiofone customers had manual roaming available to them at all times." Answer, at 10. That assertion was factually incorrect, however. See Reply,

Ann Stephens purporting to form the basis of an incorrect belief on BMI's part that Radiofone had an ownership interest in the Lafayette non-wireline system. BMI asserted that such an ownership interest would have justified the roaming disconnection. See Answer, at 10-11, Attachments 8, 9, 10, 15.

There was no evidence produced by BMI indicating that Radiofone reasonably led BMI to believe it had any such ownership interest. BMI claims it relied on misinformation generated within BMI regarding such an ownership interest, see Answer, Attachment 15, at 2, but it is difficult to credit this explanation.⁵ For instance, under BMI's logic that non-affiliated "home system" roamers were not entitled to roam on BMI's frequency block, BMI should have also interrupted the Lafayette non-wireline system subscribers' ability to roam in the Baton Rouge and New Orleans markets. BMI did not interfere with the roaming ability in those markets, however. See Reply, at 12, Attachment A. In addition, the ownership of the Lafayette non-wireline cellular system was a matter of record in the Commission's station file for CRS Station KNKA458. A simple review of that station file would have disclosed that Radiofone had no ownership interest in Lafayette.

Attachment C (Declaration of Paula Rhodes).

⁵ As Radiofone indicates, correspondence from Radiofone which is referenced in Reid Ann Stephens' Affidavit reflects Radiofone activity as a roaming coordinator for the Lafayette non-wireline system. See Reply, at 11 n.5. BMI has been unable to produce any documents from Radiofone showing that Radiofone had an ownership interest in Lafayette.